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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 472

RAYMOND J. FUNKHOUSER AND ELMER N. FUNKHOUSER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. J. FUNKHOUSER & COMPANY, APPELLANTS,

vs.

J. B. PRESTON COMPANY, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

JEREMIAH A. O'LEARY,
Counsel for Appellee.

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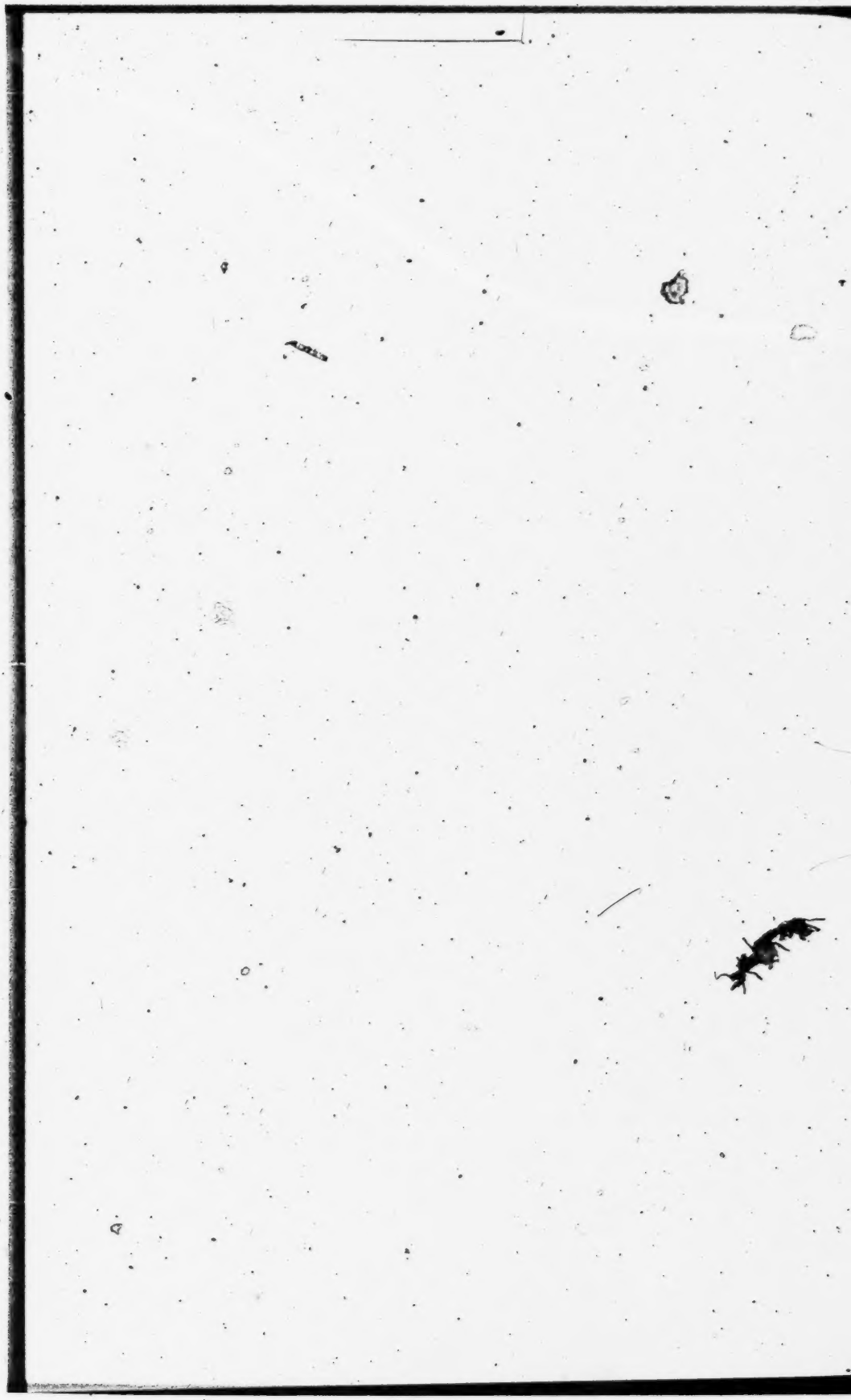

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 972

RAYMOND J. FUNKHOUSER AND ELMER N. FUNKHOUSER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. J. FUNKHOUSER & COMPANY, APPELLANTS,

vs.

J. B. PRESTON COMPANY, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

THE STATEMENT BY APPELLEE OF GROUNDS IN OPPOSITION TO APPELLATE JURISDICTION OF THE ABOVE COURT, PURSUANT TO SUPREME COURT RULE XII, PARAGRAPH III, AND MOTION TO DISMISS APPEAL.

The Appellee states the following matters and grounds against the jurisdiction of this court as as-

serted by the Appellants herein, in their statement of the basis of the appellate jurisdiction filed herein on the 11th day of April, 1933, as required by Rule XII of the Supreme Court:

I. Section 480 of the New York Civil Practice Act, as amended by Chapter 623 of the Laws of 1927, in effect April 4, 1927, which section and act the appellants claim were repugnant to the Constitution of the United States, are not repugnant to the Constitution of the United States.

The appellants' contention is that this section of the Statute of the State of New York is repugnant to the Constitution of the United States in that it impaired the obligation of the contract, for breach of which the appellee herein commenced an action against the appellants for damages and deprived them of property without due process of law. In the action for damages for breach of said contract, the appellee herein succeeded and recovered judgment against the appellants in which judgment was included interest on the principal sum found due. The contract referred to was entered into and was to be performed prior to the passage of the statute above referred to.

The contract contained no express provision with regard to interest and damages in the event of a breach of said contract. The appellants seek to read into said contract the provision that no interest shall be charged on the principal sum found due in the event of a breach. It is this provision, which the appellants seek to read into said contract, that they claim was im-

paired by the statute referred to. This contention is not sound: (*a*) The contract contains no such obligation (*Missouri, etc., Co.* v. *Sebastian*, 249 U. S. 170, 178; *Morley* v. *Lake Shore & M. S. R. R. Co.*, 146 U. S. 162, 168; *Ogden* v. *Saunders*, 12 Wheaton 317); (*b*) The statute in question does not "impair" any obligation of the contract. To impair a contract is meant to lessen, or decrease, or relieve a party to a contract from an obligation to do something, and (*c*) the statute in question is remedial in its nature and merely changes an existing right of action and does not create a new right of action (*Jacobus* v. *Colgate*, 217 N. Y. 385; *Sackheim* v. *Piqueron*, 215 N. Y. 62; *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1).

II. The Court of Appeals of the State of New York, in the instant case, held that the contract in question did not expressly, or impliedly, have, as a part of its obligation, a provision that no interest should be allowed on the principal sums found due in an action for damages, in the event of a breach of said contract. The opinion of the Court of Appeals in the instant case stated, in part, as follows:

> "It has never been held to be a part of the obligation of the contract that no interest should be allowed on unliquidated demands (*Missouri, etc.*, v. *Sebastian*, 249 U. S. 170, 178)."

In fact, the said court held that it was the implied obligation of the contract to pay interest in accordance with the rules of law existing when the case was tried.

The exact language of the Court is as follows:

> "The implied obligation of the contract was to pay interest in accordance with the rules of law existing when the case was tried."

It has been stated that a decision of the State Court denying that a contract in question confers a right which is claimed to have been destroyed, or impaired, precludes a Federal Court from taking jurisdiction on the ground that it impairs the obligation of a contract (*Missouri, etc., Interurban Ry. Co.* v. *Olathe*, 222 U. S. 187).

III. The appellants herein did not, in the trial of this action, raise the constitutional question now advanced here and it has been stated that in the absence of doing so, the Federal question has not been properly reserved (*Itow* v. *U. S.*, 233 U. S. 581). Further, the appellants in the Trial Court did not take an exception to the allowance of interest under said statute and, therefore, did not properly reserve the question for this Court to pass upon. (*Cincinnati, etc., R. Co.* v. *Thiebaub.* 177 U. S. 615; *International Harvester Co.* v. *Kentucky*, 234 U. S. 589).

IV. As stated before, this was an action to recover damages for breach of a contract which called for the purchase and delivery of certain merchandise in certain installments. The appellee here claimed that the appellants breached the contract. It was successful in the Trial Court and its contention sustained. It is conceded that the damages awarded were unliquidated

but it is contended and was contended throughout all the courts that while the damages were unliquidated, they were capable of ascertainment with reasonable certainty by computation. Under the law of the State of New York, as it existed at the time this contract was made and entered into and at the time of its breach, the appellee, independent of the statute involved, was entitled to interest on the principal sum found due as a result of said breach (*Faber* v. *New York*, 222 N. Y. 255; *Blackwell* v. *Finley*, 233 N. Y. 361; *Prager* v. *N. J. Fidelity & Plate Glass Ins. Co.*, 245 N. Y. 1; *White* v. *Miller*, 78 N. Y. 393; *DeCarricarti* v. *Blanco*, 121 N. Y. 230).

The Trial Court did not state whether it allowed interest in this case by virtue of the statute involved or by virtue of the law then existing in the State of New York independent of the statute. As a result, it does not appear on which of the two grounds that part of the judgment, which included interest, was based. Since the court might have based its judgment of interest on the law as it existed, independent of the statute, which law in itself was sufficient to sustain the judgment of interest, the Supreme Court of the United States should not take jurisdiction of this appeal. It does not appear on which of the two grounds the judgment of interest was based and the ground, independent of the statute involved, is sufficient in itself to sustain the judgment (*Allen* v. *Argrumbau*, 198 U. S. 149; *Lowry* v. *Silver City*, 179 U. S. 196; *Petrie* v. *Wampa*, 248 U. S. 154).

WHEREFORE the appellee in the above cause respectfully moves this Court for an order dismissing the appeal in the above-entitled cause and for such further relief as to the Court may seem fit and proper.

Dated April 26, 1933.

J. B. PRESTON COMPANY, INC.,
Appellee,

By JEREMIAH A. O'LEARY,
Its Attorney.

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